

In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

FILED
at 11 O'clock & 05 min. A M
Date 4/18/97
MARY C. BECTON, CLERK
United States Bankruptcy Court
Savannah, Georgia *JB*

In the matter of:)	
)	
DAVID G. HAMMOCK)	Chapter 13 Case
)	
<i>Debtor</i>)	Number <u>96-41270</u>

MEMORANDUM AND ORDER
ON DEBTOR'S OBJECTION TO CLAIM
OF THE INTERNAL REVENUE SERVICE

Debtor, an attorney who is licensed in the State of Georgia and maintains a general practice with an emphasis on bankruptcy, filed his second Chapter 13 bankruptcy case on May 23, 1996.¹ On July 15, 1996, the Internal Revenue Service ("IRS") filed a total claim in the amount of \$68,436.09, consisting of a secured claim \$64,740.49, a priority claim \$3,378.66, and an unsecured claim of \$316.94. On or about November 6, 1996, Debtor filed an objection to the claims of the Internal Revenue Service alleging "that he does not owe the amount claimed," that "he has timely filed all of his tax returns for all tax years as required by law," while admitting to the owing of "some minimal amount of taxes," but denying that the amounts set forth in the proofs of

¹Debtor initially filed for Chapter 13 bankruptcy on August 24, 1995, Chapter 13 Case No. 95-41686. He subsequently dismissed that case voluntarily prior to confirmation on April 23, 1996.

claim were correct. The hearing on the objection came on for trial on January 8, 1997, pursuant to notice and based on the evidence at that time I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1) Sometime in 1995 the Internal Revenue Service began enforcement proceedings against Debtor because the Service had learned that Debtor had become delinquent in filing employer's quarterly federal tax returns on Form 941 for the period beginning 07-01-89 through 03-31-95.

2) Revenue officer, Jean Lamson, made contact with the Debtor on or about April 20 and May 18, 1995, advising Debtor of the necessity of filing these returns. During those interviews Ms. Lamson was advised by Debtor that he had employed one individual since the beginning of 1989 and had paid that employee \$300.00 per week. Based on that Ms. Lamson calculated the approximate quarterly wages at \$3,900.00 per quarter. See Government Exhibit 72.

3) During their initial conversation Debtor informed Ms. Lamson that he had timely filed all the returns in question, but she told him that the Internal Revenue

Service had no record of such filing and if he did not take corrective action the government would file a substitute return on his behalf.

4) When Debtor failed to timely follow-up on Ms. Lamson's request, she gave him notice, by letter dated May 19, 1995, that the Service had prepared tax returns for the periods in question pursuant to 26 U.S.C. Section 6020(b).² The letter advised Debtor that if he agreed with the amount of tax due as shown he could sign and return them and if he did not agree he had thirty days from the date of the notice to provide copies of previously filed returns, or to prepare and sign forms that showed the proper amount, or to seek other administrative relief. The letter further advised that if the Debtor did not respond within thirty days the taxes would be assessed and billed to him together with applicable interest and penalties. *See* Government Exhibit 73. When Debtor made no response to this correspondence the taxes were assessed on or about July 6, 1995.

² 26 U.S.C. § 6020 provides:

(a) **Preparation of return by Secretary.** If any person shall fail to make a return required by this title or by regulations prescribed thereunder, but shall consent to disclose all information necessary for the preparation thereof, then, in that case, the Secretary may prepare such return, which, being signed by such person, may be received by the Secretary as the return of such person.

(b) **Execution of return by Secretary.** (1) **Authority of Secretary to execute a return.** If any person fails to make any return required by any internal revenue law or regulation made thereunder at the time prescribed therefor, or makes, willfully or otherwise, a false or fraudulent return, the Secretary shall make such return from his own knowledge and from such information as he can obtain through testimony or otherwise.

(2) **Status of Returns.** Any return so made and subscribed by the Secretary shall be prima facie good and sufficient for all legal purposes.

5) Debtor failed to respond to this assessment until December 1995 when he filed what purported to be Form 941 returns for the periods in question. Unfortunately, the returns, although signed and dated December 28, 1995, were deemed "non-processable" by the Service because Debtor failed to include certain information, including the number of employees, total wages and tips, and total tax withheld. Instead, Debtor simply filled in lines 11 and 15 which showed the total taxes and the balance due. See Government Exhibits 3-27.

6) On or about May 7, 1996, Debtor addressed a letter to Jean Lamson "requesting your assistance in the amending and completion of my 941 tax returns." See Exhibit P-1. The government elected not to act on this request and subsequently on or about May 21, 1996, Debtor prepared and forwarded returns, which contained more complete wage information, to the Bankruptcy Section of the Internal Revenue Service, but they were not filed in the IRS Service Center. See Exhibit P-2. Based on these later filings Debtor admits owing principal tax liabilities of \$18,891.40. See Letter Brief of Internal Revenue Service, Jan. 31, 1997. He points out that he scheduled his Internal Revenue Service obligation when he filed his case at approximately \$26,000.00 and believes the difference in the two numbers is attributable to penalty and interest.

7) Throughout this process, Debtor has provided misleading, incomplete, and inconsistent information to the Internal Revenue Service. Specifically, when Debtor submitted W-2 forms for his employees for the period 1989 through 1995 on May 7, 1996 (Government Exhibits 31-37), it revealed that the actual total of withholdings from his employees for income tax, Social Security and Medicare was \$16,067.91. This amount excluded the employer's share or contribution to the withholding which would have increased the amount by approximately one-third of the total and as a result the total payments to the United States should have totaled in excess of \$20,000.00. However, when Debtor earlier prepared and filed his returns dated December 28, 1995, he showed a total balance due the IRS of approximately \$3,500.00 and signed those returns under penalty of perjury certifying that they were true, correct and complete. On Debtor's personal 1994 and 1995 1040 income tax returns, he showed that \$1,200.00 had been withheld and remitted to the Internal Revenue Service in each of those taxable years, when in fact no such withholding or remittance to the United States had been made, yet he used the \$1,200.00 credit in each of those years against the tax liability which his return revealed. See Exhibits G-24 and G-101. Additionally, when Debtor initially was contacted by Ms. Lamson he asserted that he had filed his returns for the years 1989 through 1995 when in fact he had not.

8) Debtor was not responsive to the various requests for information and notices provided by Ms. Lamson. In part because the IRS had already filed substitute returns and assessed tax and attempted to levy, and in part because of the Debtor's lack of cooperation and lack of truthfulness with the Service as set forth in paragraph 7, the Service elected not to accept, as amended returns, the information which he provided to the Service in May 1996. Furthermore, an examination of the total wages paid during calendar years 1989 through 1995 to his employees as revealed on various filings with the Internal Revenue Service, the State of Georgia, and as produced during the discovery phase of this matter, reveal totally inconsistent figures. See Exhibit "A" to Order. Accordingly, the IRS considers none of the information to be reliable and is unwilling to voluntarily recalculate Debtor's tax liability. Moreover, the Service contends that the Court should make a determination that Debtor's evidence lacks credibility and that the liability established by the substituted returns filed by the Service should be upheld as the actual liability which Debtor should be required to liquidate in the course of his Chapter 13 case.

CONCLUSIONS OF LAW

In bankruptcy proceedings, a claimant bears the burden of proving its claim filed pursuant to 11 U.S.C. Section 502(a). See In re Abel, 200 B.R. 816 (E.D.Pa.

1996). However, Bankruptcy Rule 3001(f) provides that "[a] proof of claim executed and filed in accordance with these rules shall constitute *prima facie* evidence of the validity and amount of the claim (emphasis added)." According to the Third Circuit,

. . . a claim that alleges facts sufficient to support a legal liability to the claimant satisfies the claimant's initial obligation to go forward. The burden of going forward then shifts to the objector to produce evidence sufficient to negate the *prima facie* validity of the claim filed. It is often said the objector must produce evidence equal in force to the *prima facie* case. In practice, the objector must produce evidence which, if believed, would refute at least one of the allegations that is essential to the claim's legal sufficiency. If the objector produces evidence to negate one or more of the sworn facts of the proof of claim, the burden reverts to the claimant to prove the validity of the claim by a preponderance of the evidence. The burden of persuasion is always on the claimant.

In re Allegheny Int'l, Inc., 954 F.2d 167, 173 (3rd Cir. 1992). In other words, the claimant always retains the ultimate burden of proof; however, a claim once filed is *prima facie* valid and the burden is on the debtor to refute at least one aspect of the claim's legal sufficiency in order to shift the burden back to the claimant. A conflict often arises when the Internal Revenue Service files a tax claim because under traditional tax law outside of bankruptcy, the ultimate burden of proof remains with the taxpayer. The Courts of Appeals are split on this issue. See In re MacFarlane, 83 F.3d 1041, 1045

(9th Cir. 1996) (following the Fifth, Eighth, and Tenth Circuits by holding that the taxing authority holds the ultimate burden of proof); *contra In re LandBank Equity Corporation*, 973 F.2d 265 (4th Cir. 1992); *Resyn Corp. v. United States*, 851 F.2d 660, 663 (3rd Cir. 1988). The Eleventh Circuit Court of Appeals has not decided this issue although several district courts in the Eleventh Circuit recently have placed the ultimate burden on the taxing authority. See *In re Arndt*, 201 B.R. 853, 857 (M.D.Fla. 1996); *In re Vines*, 200 B.R. 940, 948 (M.D.Fla. 1996). After reviewing these authorities, I hold that in bankruptcy proceedings, the ultimate burden remains with the claimant. Since the claim of the IRS constitutes *prima facie* evidence as to its validity and amount, see Fed.Bankr.R. 3001(f), Debtor, who has objected in part both to the claim's validity and amount, bears the burden of presenting evidence sufficient to rebut the presumption in order to shift the burden of going forward back to the IRS.

Debtor's objection filed on November 6, 1996, states that he objects to the Services's claim because "he does not owe the amount claimed." Debtor concedes that he owes "some minimal amount of taxes," but denies the amount set forth in the proof of claim. The IRS asserts that Debtor has made false and misleading statements throughout their investigation and, therefore, any evidence proffered solely by the Debtor is unreliable and does not satisfy his burden. I agree. Simply stated, Debtor has no

credibility. As a result, any evidence submitted by Debtor that has not been independently verified by another source is entitled to little weight. The evidence presented by the Service clearly demonstrates that over the course of the past few years Debtor falsified tax documents, falsely stated that tax returns had been filed, and grossly underestimated tax returns that he filed. Specifically, on Debtor's personal 1994 and 1995 1040 income tax returns, he showed that \$1,200.00 had been withheld and remitted to the Internal Revenue Service in each of those taxable years when in fact no such withholding or remittance to the United States had been made. Moreover, on at least one occasion, Debtor stated to the Service that he had filed his tax returns when in fact he had not. Finally, when Debtor prepared and filed his Form 941 returns dated December 28, 1995, he showed a total balance due the IRS of approximately \$3,500.00 and signed those returns under penalty of perjury certifying that they were true, correct and complete; however, his employee's W-2's from the period in question reveal a minimum amount due of \$16,067.91.

In this context, the Court will review each proof of claim filed by the IRS in light of the evidence presented at the hearing and determine whether or not to sustain Debtor's objection as to each claim.

I. Income tax for the quarter ending 06-30-89

On July 5, 1995, the IRS assessed an income tax liability on Debtor for the tax period ending June 30, 1989. In its proof of claim, the IRS asserts that Debtor still owes \$280.53 resulting from interest that accrued until the petition date. During the hearing, Debtor presented no evidence to rebut this portion of the Service's proof of claim. In fact, by letter brief dated February 8, 1997, Debtor admits that "[a]ccording to [his] recollection, [that issue was not] discussed or litigated at the recent court hearing." Accordingly, the claim is *prima facie* correct and Debtor's objection to the Service's claim for interest due for the tax period ending 06-30-89 is overruled.

II. FUTA tax for the quarter ending 12-31-90

On July 5, 1995, the IRS assessed a FUTA tax liability on the Debtor for the tax period ending December 31, 1990. The IRS asserts that the Debtor still owes a tax of \$434.00, penalty of \$260.40, and interest in the amount of \$309.34. During the hearing, Debtor presented no evidence to rebut this portion of the Service's proof of claim. In fact, by letter brief dated February 8, 1997, Debtor admits that "[a]ccording to [his] recollection, [that issue was not] discussed or litigated at the recent court hearing." Debtor asserts by letter brief that he filed his 1990 FUTA tax return and paid the corresponding tax of \$60.00. Debtor has attached a copy of his 1990 form 940 tax

return; however, Debtor has not produced any canceled checks or other documentation to support this contention. Accordingly, Debtor's objection to the Service's claim of FUTA tax liability for the period ending December 31, 1990 is overruled.

III. FICA tax for the quarters beginning 07-01-89 and ending 03-31-95

The Service's claim for unpaid withholding taxes from 10-01-89 through 03-31-95 is clearly the most significant claim and greatest source of contention between the parties. The IRS has filed a claim for taxes due of \$31,496.08, penalties of \$17,418.18, and interest of \$14,541.96. Pursuant to Debtor's form 941's, recently amended on May 21, 1996, Debtor contends that he owes \$18,891.40 in tax, \$6,877.20 in interest, and \$10,175.39 in penalties. However, because of the credibility issues already alluded to, in the absence of other documentation that independently verify his contention, I find the *prima facie* effect of the Service's claim has not been overcome, and Debtor's objection is overruled. See Matter of Summa T Corp., Int'l, 73 B.R. 388, 394 (Bankr.E.D.Ark. 1987) (holding that evidence offered by Debtor to refute claim of the IRS was not credible after considering witness' interest, appearance, and demeanor).

Over the course of the Service's investigation, Debtor has provided the IRS with five different sources from which to compute his form 941 taxes, including

copies of filed W-2's, form 940 unemployment tax returns, Georgia employer's quarterly tax and wage reports, a hand written wage summary, and amended 941's. *See Exhibit "A" to Order.* A comparison of the total wages paid shows significant discrepancies between each of the documents provided by the Debtor. A cursory examination reveals that (1) with the exception of 1990, the handwritten wage summary provides the lowest amount of wages paid and taxes owed for each year in issue, (2) with the exception of 1991, the form 940 unemployment tax returns provide the highest amount of wages paid and taxes owed for each year in issue, (3) the W-2's and Georgia Employer Quarterly Tax and Wage Reports are similar and support a finding of an intermediate amount of wages paid and taxes owed, and (4) with the exception of 1995, the amended 941's, which Debtor now requests this Court to adopt, seem to represent a hybrid of the W-2's and Georgia Employer Quarterly Tax and Wage Reports, adopting the lower of the two wage amounts for each year in issue. Additionally, as mentioned previously, Debtor also filed copies of 941's on December 28, 1995, under penalty of perjury, that failed to include any wages paid during any of the periods in question. *See Government's Exhibit 3-27.*

In short, Debtor's documents are self-contradictory and unreliable to form the basis for any ruling. Accordingly, I hold that Debtor has failed to rebut the

IRS's *prima facie* case.

IV. Income tax due from the tax years 1994 and 1995

Debtor offered no evidence to refute the Service's unsecured priority claim of \$1,196.00 in 1994 taxes, \$867.06 in 1994 interest, and \$1,315.60 in 1995 taxes. Debtor also offered no evidence to refute the Service's general unsecured claim of \$316.94 for penalties arising from unsecured priority claims. It appears that these amounts are not disputed. Based on the foregoing, Debtor's objections are overruled and the IRS claim, as filed, is allowed.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law IT IS THE ORDER OF THIS COURT that Debtor's objections are overruled and the claim of the Internal Revenue Service is allowed as filed.



Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 17th day of April, 1997.

Exhibit "A"

Tax Year	W-2 Totals to IRS on 5/7/96 (Gov't Exhibits 31-37)	Form 940 Unemployment Tax Returns to IRS on 5/7/96 (Gov't Exhibits 38A-42)	Georgia Employer's Quarterly Tax & Wage Reports to IRS on 5/7/96 (Gov't Exhibits 43-71)	Fax Wage Summary to Dept. of Justice on 4/19/96 (Gov't Exhibit 29)	Debtor's Amended 940 Returns filed 5/21/96 (Exhibit P-2)
1989	\$8,218.00		\$8,533.00	\$7,800.00	\$8,213.00
1990	8,170.00	11,500.00	7,860.00	9,100.00	7,860.00
1991	13,582.00	11,582.00	11,582.00	9,100.00	11,582.00
1992	17,445.00	17,445.00	17,445.00	9,750.00	17,445.00
1993	31,320.00	31,320.00	17,530.00	10,400.00	17,530.00
1994	16,900.00	31,320.00	17,010.00	11,700.00	16,900.00
1995	19,531.00	19,491.00	19,286.00	12,675.00	*2,500.00

*Wages from first quarter of 1995 only.